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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/001,439	10/25/2001	Bill H. McAnalley	013258.0294	2421
27683	7590	01/12/2006	EXAMINER	
HAYNES AND BOONE, LLP 901 MAIN STREET, SUITE 3100 DALLAS, TX 75202			COE, SUSAN D	
			ART UNIT	PAPER NUMBER
			1655	

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/001,439
Filing Date: October 25, 2001
Appellant(s): MCANALLEY, BILL H.

Randall C. Brown
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed October 26, 2005 appealing from the Office action mailed May 27, 2005.

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(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

US 5,576,015	DONZIS	11-1996
US 5,531,989	PAUL	06-1996
WO 97/05884	PLAUT	02-1997

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1, 8-17, and 19 stand finally rejected under 35 U.S.C. 103(a) as being unpatentable over US Pat. No. 5,576,015, US Pat. No. 5,531,989, and WO 97/05884 for the reasons set forth in the Office action of May 27, 2005.

Appellant's claims are drawn to a composition that comprises beta-glucan, lactoferrin, colostrum, essential saccharides and pectin.

US '015 teaches that beta-glucan from yeast cell walls enhances host immune resistance to diseases caused by bacterial and viral infection (see column 1, lines 20-38).

US '989 teaches that a composition comprising lactoferrin and fiber enhances the patients immune system and treats diseases caused by bacteria, viruses, fungi, and parasites (see column 3, lines 32-50). US '989 teaches that the fiber is from citrus pectin and from guar gum. **Guar gum is specifically claimed by applicant in claim 19 as containing "essential saccharides."** Thus, this reference shows that it was known in the art at the time of the invention that compositions containing lactoferrin, "essential saccharides," and citrus pectin enhance the immune system and also treat diseases caused by bacterial and viral infection.

WO '884 teaches that lactoferrin and colostrum strengthen the immune system (see page 3, second paragraph). In addition, this composition is taught to treat diseases caused by bacterial and viral infections (see page 2, last paragraph).

Thus, these references show that it was well known in the art at the time of the invention that all of the claimed ingredients, essential saccharides, lactoferrin, colostrum, and citrus pectin, were known to enhance a patient's immune response and to treat bacterial and viral infections. It

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has been well established that it is obvious to combine two or more ingredients that are known to be used for the same purpose, it is obvious to combine the compositions taught by the prior art into one composition. As discussed in MPEP section 2144.06, "It is prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose.... [T]he idea of combining them flows logically from their having been individually taught in the prior art." Motivation for such a combination stems from the teaching of equivalence of the ingredients in the art for the dual purposes of enhancing the immune system and treating bacterial and viral diseases. Therefore, a person of ordinary skill in the art would reasonably expect that a combination of the ingredients would yield a beneficial composition and would be motivated to combine the ingredients taught by the reference together into one composition.

(10) Response to Argument

Regarding the 103(a) rejection based on the combination of US Pat. No. 5,576,015, US Pat. No. 5,531,989, and WO97/05884, the appellant argues that the combination of US '015, US '989, and WO '884 is based on improper hindsight reconstruction. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). As discussed above, the combination of the references is based on properties of the ingredients as

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disclosed in the references. Thus, the rejection is not based on improper hindsight reasoning but is based on what was known in the art at the time of the rejection.

In addition, the appellant argues that US '015 teaches a composition comprising beta glucan but does not teach a composition of beta glucan, colostrum, citrus pectin, and essential saccharides. The appellant also argues that while US '989 teaches a composition of lactoferrin and fiber such as citrus pectin, the reference does not teach a composition comprising beta glucan, colostrum, citrus pectin, and essential saccharides. In addition, the appellant argues that WO '884 teaches a composition of colostrum and lactoferrin but does not teach a composition comprising beta glucan, colostrum, citrus pectin, and essential saccharides. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). None of the references alone are considered to teach a composition that contains all of the ingredients claimed by the appellant. As discussed above, a combination of the three references is considered to teach the composition claimed by the appellant.

The appellant also argues that there is no motivation for combining the references together. The appellant argues that since there are hundreds of ingredients known to strengthen the immune system it would not be obvious to select the specific ingredients claimed by the appellant from these hundreds of ingredients. The appellant cites from MPEP 2144.06 *In re Geiger*, 815 F.2d 686, 2 USPQ2d 1276 (Fed. Cir. 1987) as stating that a combination of ingredients with known equivalent purposes is "at best...obvious to try...". In addition, the

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appellant cites *In re Dembiczak*, 50 USPQ 2d 1614, 1616-17 (Fed. Cir. 1999) as stating that actual evidence is required for a 103 rejection. The appellant contends that no actual evidence is presented by the examiner and that the combination of the references would only be obvious to try with no reasonable expectation of success. However, the rejection is considered proper because the teachings of the references provides proper motivation and a proper expectation of success. Each reference teaches that the specific ingredients claimed by the appellant is known to have an equivalent purpose. Each reference teaches that each ingredient is known to enhance the immune system of a patient to aid in the resistance to and treatment of infection with bacteria and viruses. Thus, the references teach that each ingredient has the same function and carries out this function with the same mechanism of action. Each ingredient treats infection by aiding the function of the patient's immune system. Thus, there is evidence in the references that shows the purpose and mechanism of action of each ingredient. This evidence in the references shows a known equivalent purpose. As discussed in MPEP section 2144.06,

It is prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose.... [T]he idea of combining them flows logically from their having been individually taught in the prior art.

In re Kerkhoven, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980)

Thus, the suggestion to combine the references comes from the references themselves.

An artisan of ordinary skill in the art would clearly have a reasonable expectation that a combination of ingredients known to be used for the same purpose would produce a successful composition. Such a combination would be expected to combine the function of each of the individual ingredients together in order to produce a product with a superior ability to fight infection through the enhancement of the immune system. The superior ability would be

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expected because a combination of ingredients with equivalent purposes would be expected to have an additive effect of the purpose. Therefore, the reasonable expectation of superior results would motivate a person of ordinary skill in the art to combine the claimed ingredients together based on their known shared properties.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



Susan D. Coe

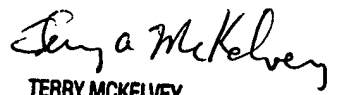
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